**Foreign Intelligence Surveillance Act (FISA)** [**http://www.cnss.org/fisa.htm**](http://www.cnss.org/fisa.htm) **INSIBILO**

***The Foreign Intelligence Surveillance Act (FISA) was first enacted in 1978 (Public Law 95-511) and later amended by the Patriot Act.� It is at the center of the controversy concerning domestic spying by the NSA.� It was passed after revelations of massive domestic spying abuses by the FBI, CIA and NSA were documented in reports issued by the Church Committee in the 1970s.� In 1972, the United States Supreme Court had reviewed some of those abuses and declared that warrantless wiretaps of domestic groups for national security reasons were a violation of the Fourth Amendment.� United States v. United States District Court (Keith), 407 U.S. 297 (1972****).*

*The FISA provided special procedures for conducting electronic surveillance of telephones, etc for foreign intelligence purposes including setting up a Foreign Intelligence Surveillance Court to authorize such surveillance.�* ***50 U.S.C. 1801*** *et seq. available at* ***http://caselaw.lp.findlaw.com/casecode/uscodes/50/chapters/36/toc.html.****�* **The Act provides for surveillance of American citizens and others for whom the court determines that there is probable cause that they are �agents of a foreign power� as defined in the statute.**

**02/01/2010 50 USC CHAPTER 36 - FOREIGN INTELLIGENCE SURVEILLANCE http://1.usa.gov/lBxugr**

**July 9, 2008** [**http://bit.ly/jE6RrZ**](http://bit.ly/jE6RrZ)

**Center for National Security Studies, Protecting civil liberties and human rights Director.**

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***The Center for National Security Studies is deeply disappointed the Senate passed the FISA Amendments Act at President Bush’s behest today. In our view, this unconstitutional bill is a major setback for Americans’ constitutional rights This legislation eviscerates long-standing privacy protections for Americans’ international communications*.**

**Under these new powers:**

***More personal phone calls and e-mails of Americans will be acquired, retained, and analyzed by the NSA than ever before in US history***

**Even more warrantless surveillance of American communications will occur than President Bush admitted occurred under the TSP**

**No Fourth Amendment warrant will be required for broad electronic surveillance of streams of international communications, so long as the NSA does not “target” a particular American at the outset; and the NSA will be able to build the biggest database of American communications ever constructed.**

**This bill grants new spying powers that will mean a sea change to the detriment of the privacy rights of Americans. When the audit of the warrantless surveillance program is complete and the Congress and the public learn the scope of the government surveillance, we believe there will be greater political will to restore the basic constitutional protections that were eviscerated today. And the Center for National Security Studies intends to hold Members to their commitments to revisit these powers in the next Congress.**

**On June 19, 2008** [**http://www.cnss.org/fisa.htm**](http://www.cnss.org/fisa.htm)

**The FISA Amendments Act of 2008 was introduced by Representative Reyes and was passed the next day in the House. The Center strongly opposed this legislation, as voiced in our July 9th statement on the passage of the FISA Amendments Act and our June 25th memorandum to Senators, urging them to vote �no� on H.R. 6304.� This legislation was passed in the Senate on July 9th and signed into law.**

**June 9, 2008** [**http://www.cnss.org/fisa.htm**](http://www.cnss.org/fisa.htm)

**Letter to members of Congress, the Center opposed Senator Bond�s new FISA legislation, which was touted as a �compromise� between the previously passed House (H.R. 3773 substitute) and Senate (S. 2248) versions.**

**On March 14, 2008** [**http://www.cnss.org/fisa.htm**](http://www.cnss.org/fisa.htm)

**The House passed a new bill that incorporates parts from both the Senate�s FISA Amendments Act of 2007 (S. 2248) and the House�s RESTORE Act (H.R. 3773).� To read why the Center believes the new bill was better than both the Protect American Act and the bill passed by the Senate in February, but still deeply flawed from a civil liberties perspective, please see our March 12th letter to Chairmen Conyers and Reyes.**

**On February 12, 2008** [**http://www.cnss.org/fisa.htm**](http://www.cnss.org/fisa.htm)

**The Senate passed the FISA Amendments Act of 2007, S. 2248, as reported by the Senate Select Committee on Intelligence (SSCI).� In the process, they rejected several amendments that would have added more civil liberties protections to the bill, including the Feingold-Webb-Tester amendment, which was supported by the Center in a letter written to the Senate in January.� The Center and a coalition of other civil liberties organizations also sent a letter to the Senate in December of 2007 opposing the SSCI bill because it �unreasonably and unnecessarily authorizes broad surveillance of Americans� international communications without meaningful Fourth Amendment protections.�� For further explanation of the Center�s opposition to the Intelligence Committee bill please read our memorandum to interested persons (December 6, 2007) and a previous letter sent to Chairman Leahy and Senator Specter of the Senate Judiciary Committee (November 14, 2007).**

**December 10, 2007** [**http://thenexthurrah.typepad.com/the\_next\_hurrah/terrorism/**](http://thenexthurrah.typepad.com/the_next_hurrah/terrorism/)

**by emptypockets**

**Mike McConnell, the director of national intelligence, writes in an op-ed in this morning's New York Times that FISA, which requires court review of certain kinds of government wiretaps, "slowed -- and sometimes prevented -- our ability to collect timely foreign intelligence." He urges Congress to renew the Protect America Act, a temporary measure passed this year that bypasses FISA, and is due to expire in February.**

**Having personally transcended outrage, mockery, and scorn, I am going to go ahead and take McConnell at his word.**

**He writes that FISA has "not kept pace with changes in technology" (FISA was created in response to the illegal government activities of the Nixon administration) and that, under FISA, "our experts were diverted from tracking foreign intelligence threats to writing lengthy justifications to collect information from a person in a foreign country". Bottom line? "The intelligence community should spend its time protecting our nation, not providing privacy protections to foreign terrorists".**

**Which raises the question -- if they know who the terrorists are, why not go get them? Why is McConnell spending his time fighting political battles in Washington, DC, which even if won, will only let him listen in on phone calls? Why does he want to divert our experts to listening to tapes when they could be out catching bad guys?**

**I can imagine one reason: monitoring known terrorists may lead to the capture of larger groups of terrorists. But, to me, that stands too great a risk of losing track of them, as occurred with bin Laden. Shouldn't McConnell and the US government capture these terrorists while they can? Why are they playing soft with them?**

**The other possibility, of course, is that McConnell doesn't actually know yet who the terrorists are, and wants to be able to eavesdrop on lots of private conversations of innocent civilians, with the hopes that that will turn up a handful of terrorists. But that's not what he's saying, and I'm prepared to take him at his word: he knows where they are, he knows who they are. He'd just rather listen in than stop them.**

**December 02, 2007** [**http://thenexthurrah.typepad.com/the\_next\_hurrah/bushrepublican\_scandals/**](http://thenexthurrah.typepad.com/the_next_hurrah/bushrepublican_scandals/)

***The FISA Document Dump, An Inventory:* by emptywheel**

**I've put together an excel file listing the documents included in Friday's document dump on the communications DNI McConnell had regarding the FISA amendment.**

**Here's what I've noticed:**

**There's a weird chronology behind the response to the FOIA request**

**The DNI's definition of duplicative is different than my definition of duplicative**

**The DNI must consider Republican correspondence classified**

**The DNI seems to lose Democratic correspondence**

**Weird Chronology**

**First, the chronology. EFF originally FOIAed documents on August 31, asking for records on both meetings with telecoms and discussions with Congress (there were actually two separate FOIA requests--see exhibits K and L here). On both FOIA requests, EFF asked for materials dating from April 2007 to "the present." On September 10, DNI responded to EFF saying it would expedite the EFF request.**

**Now look at the dates on the documents included. They start with one document from before the time frame--a March 23 letter from the SSCI leadership asking for a FISA bill. It's a pretty important document because it shows Congress taking the lead on this, which may be why they included it. But then the documents go through September 26--long after the August 31 request, and more than two weeks after DNI said it was expediting the EFF request. But then, it stops short of what are likely to be some interesting events leading up the October 18 SSCI bill.**

**There is probably a very reasonable explanation: that DNI took "present" to mean that time when it started working on the request. Though if that's true, it suggests DNI sat on the request for almost two weeks, before it started expediting anything.**

**"Duplicative"**

**Now, when DNI explained why the review process took so long (and presumably, why they couldn't give us document through the "present" of late November), one of the things they claimed they would do is remove duplicate documents.**

**As the records are located and forwarded to** the **IMO, the FOIA analyst handling this case conducts a continual analysis and review of the documents located. During the review process the analyst handling this case first removes any non-responsive and duplicative material from the records that are received. She then creates working copies of the documents and document indexes and assesses whether there would be any necessary consultations and/or referrals with those entities maintaining equity in the documents. She also reviews the records for the application of any FOIA exemptions. [my emphasis]**

**Which is why I find it curious that there are two copies of McConnell's May 1 testimony before SSCI and two copies of his September 18 testimony before HJC. I'll need to go back and look closely to see if these are just two revisions. But if not, it appears that this analyst, who spent at least two months reviewing these documents, still couldn't find all the duplicative documents.**

***Also, what's with the date on McConnell's September testimony to SSCI? It took place on September 25, but is dated September 20.***

**October 17, 2007** [**http://thenexthurrah.typepad.com/the\_next\_hurrah/2007/10/what-happened-t.html#more**](http://thenexthurrah.typepad.com/the_next_hurrah/2007/10/what-happened-t.html#more)

**What happened to the House FISA bill? by Kagro X**

**The House was scheduled to take up the RESTORE Act today, in an effort to roll back the August FISA debacle. But as predicted last week, the bill fell victim to yet another Republican motion to recommit (see linked story for a backgrounder on the motion). As TPM Election Central reported earlier, Rep. Eric Cantor (R-VA) announced his intention to offer a motion to recommit the bill with instructions that it be amended "promptly" to include language that nothing in it:**

**"shall be construed to prohibit the intelligence community from conducting surveillance needed to prevent Osama Bin Laden, Al Qaeda, or any other foreign terrorist organization...from attacking the United States or any United States person."**

***First, it means that Cantor has devised a vote that some strategists worry will be very tough for Democrats from marginal districts to resist. How, they fret, will these Democrats be able to explain voting no on an "amendment" that supposedly ensures that intelligence operatives won't be tied up in red tape when they need to prevent a terrorist attack?***

**Second, it means that if enough Democrats sweat this vote and go along with Republicans, the bill gets "recommitted" -- that is, it's sent back to committee.**

***Third, the choice of the "promptly" language means the bill gets delayed, and can't come to the floor for passage right away. Why is that?***

**There are two basic kinds of motions to recommit: those with instructions and those without. Motions to recommit without instructions send the bill back to committee without telling the committee what to do to fix it. In practice, that means the bill is dead.**

**Motions to recommit with instructions are themselves of two basic types: those which direct the committee to make certain changes and report (send) the bill back to the House "forthwith" (in practice, meaning immediately, without even leaving the House floor), and those directing the committee to make its changes "promptly" (meaning debate on the bill actually stops, and moves back to the committee.**

**Most motions to recommit offered these days are the "forthwith" type, which ends up looking to the C-SPAN audience just like any other amendment. It's all taken care of right there on the spot. But a bill recommitted to be reported back "promptly" is not allowed straight back onto the floor. The committees actually have to hold on to them and do the work of fixing the bill separately, which often causes enough delay to kill the bill entirely. And even if it doesn't kill it, it still has go back to the floor, and possibly face yet another motion to recommit it.**

**But the most egregious part of this particular motion to recommit is that the language Cantor claims to want included in the bill is, depending on how you read it, either redundant (which means recommitting it is a waste of time even if you brought it right back onto the floor) or completely meaningless in any legal sense (which means recommitting it is not just a waste of time, but possibly totally stupid and/or evil).**

**You see, the bill already has a section outlining procedures for the emergency acquisition of intelligence of this type. So Cantor's motion to recommit is just a gratuitous invocation of Osama bin Laden's scary, scary name, and a way to make Democrats "choose" between moving the bill forward as scheduled or going on record as being "against" tracking down bin Laden.**

**Of course, what they'd actually be on record against is derailing a bill that allows intelligence operatives to track any terrorist, so that the committee can write Osama bin Laden's name in the bill, and make sure that everyone knows that he's included among the terrorists the bill allows tracking.**

**But hey, if you vote no, you're "voting against tracking down bin Laden."**

**Couldn't Democrats just say, "OK, fine. You're an idiot, but if you want bin Laden's name in the bill, you've got it. Let's just move on, amend the bill right here and now, and then pass it?"**

**Well, they could say so, but remember, Cantor purposely chose the "promptly" language rather than the "forthwith" language. And that means he's intentionally demanding a delay, even if the amendment gets added. Why?**

**Because this bill revises the complete capitulation bill passed in August. So the longer it takes to pass this new one, the longer the capitulation bill stays on the books. Cantor is more concerned with blocking the new bill than he is in seeing that it contain bin Laden's name.**

**Meanwhile, we're now facing pretty much the same situation we had in August. The much better House bill is dead in the water until the Democrats can figure out a way to be sure their Members will stay home on any motion to recommit. And at the same time, the Senate bill -- which is expected to contain the absolutely insane retroactive immunity provisions for the telecom companies that sold out your private phone records (possibly in exchange for fat contracts and preferential review of their merger proposals, but that's another story) -- will likely end up being passed before the House bill, making the Senate bill the "gold standard," so to speak. Republicans will be able to get the Bush Dogs sweating again, maybe telling them they'll offer a motion to recommit next time that adds the immunity provisions so that the two bills match up better and will get signed by the president, without everyone having to delay the next recess to try to come up with a new bill before the August law sunsets. But however this shakes out down the road, for now, the House bill is on indefinite hold.**

**September 17, 2007** [**http://thenexthurrah.typepad.com/the\_next\_hurrah/2007/09/the-united-stat.html**](http://thenexthurrah.typepad.com/the_next_hurrah/2007/09/the-united-stat.html)

**The United States of AT&T: by emptywheel | Permalink**

**“Basically, Bush just gave AT&T the ability to have its long-time lawyer give it legal authority to collaborate with the government to spy on citizens.”**

**Back in June, the BUSH Administration invited one of AT&T's key lobbyists, Ed Gillespie, to serve as White House counselor. A few weeks after that, BushCo expanded AT&T's resident lobbyist's role to include most of Karl Rove's portfolio. Just days after Gillespie took over that role, the DOJ made an unusual intervention into the FCC's request for comments on Net Neutrality, weighing against Net Neutrality.**

**Well today, one of AT&T's former key attorneys, Peter Keisler, just took over the Department of Justice.**

**In the late 1990s, Keisler represented AT&T before SCOTUS in a case divvying up authority over how the 1996 Telecom Act would be implemented. He represented AT&T and other telecom companies fighting local ordinances limiting the acts of telecommuncation companies.**

**In early 2001, Keisler helped AT&T win the dismissal of a lawsuit that charged AT&T had illegally shared private information (a customer's unlisted phone number) with AT&T's credit division.The Second Circuit ruled that transfer of such personal information does not incur damages, and therefore private citizens cannot sue.**

**In June 2006, Keisler was one of a number of government lawyers arguing that New Jersey had no legal authority to subpoena documents relating to AT&T's and other telecomm companies' participation in the warrantless wiretapping program. *Also in June 2006, Keisler invoked state secrets in Hepting v. AT&T, an attempt to scuttle the citizen lawsuits on the warrantless wiretap program*.**

**In other words, both in and out of government, Keisler has represented AT&T's interests masterfully.**

**Which makes it rather disconcerting that the AG has the authority to authorize telecomm companies to cooperate in government spying.**

**(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with:A) a court order directing such assistance signed by the authorizing judge, or (B) a certification in writing by a person specified in section 2518 (7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required.**

**And in case you're worried that AT&T is stuck with no good legal representation, having lost Keisler, rest assured. You see, former Associate White House Counsel Brad Berenson (who also happens to be Kyle Sampson and Susan Ralston's lawyer) has taken over for Keisler and is working on the AT&T case, among other things.**